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ARTICLE

Article 37: The right to liberty of person under the Chinese constitution

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Abstract The question of constitutional rights within the Chinese legal regime remains an area of debate and controversy between both Chinese and foreign scholars. Issues of direct effect and justiciability are still unresolved, much due to the lack of a formal interpretation that sets out a basis for the understanding of scope and content of constitutional rights. This has led to the conclusion that constitutional provisions can only be guaranteed through “transformation” into lower level legislation which is to be binding upon the organs of state and citizens. This case study explores the right to liberty of person as stipulated under Article 37 of the constitution as case study, arguing that while many areas see ample legislative protection, the nature of the legal system and rights theory in China is vulnerable to arbitrariness and abuse.

Keywords Chinese law · Constitutional rights · Liberty of person

A slow awakening of constitutionalism provides encouragement that the consciousness of rights within China is increasing. Even the government has publicly acknowledged that rights are to be enjoyed and continues efforts to create a system of socialist legality—indeed the successful construction of a formalist “socialist system of laws” was proclaimed during the National People’s Congress (NPC) in 2011.¹ However, there are challenges to this claim. China is often criticized for neglecting or even violating the rights of its citizens: some within the country even argue that the Chinese legal system does not recognize the existence of rights as such, or that the legal system is ill equipped to handle human rights claims.

¹ NPC Standing Committee Work Report delivered to the fourth plenary session of the 11th NPC (2011).

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The Chinese government vehemently opposes such criticism, arguing that the framework of the Chinese constitution and laws offer ample protection of its citizens' rights. Nevertheless, China lacks both a formal interpretation of any constitutional rights by the legislature² and an effective constitutional review mechanism either within the NPC or courts. Consequently, it is difficult, if not impossible, to say exactly what these guarantees are.

Conventional wisdom in China conjectures that constitutional rights are protected through general legal procedure rather than constitutional procedure, and one ends up relying on the strength of lower level legislation for an understanding of the actual operationalization of constitutional rights.³ In an attempt to shed some light on constitutional rights, this paper will explore the existing formal framework for the enjoyment of constitutional rights in China, in light of substantive law and practice. Considering the rather large catalogue of rights found within the Chinese constitution, in the following we will make use of the right to liberty of person (*renshen ziyou* 人身自由) as stipulated in article 37 of the PRC Constitution as a case study. A challenge to this choice, however, is that the enjoyment of the right to liberty of person is met with particular constraints within Chinese legal practice, and these constraints may not be equally shared by all of the rights within the Constitution. While this caveat stands, this study aims to demonstrate how Chinese constitutional rights may be defined, and by way of specific illustrations, provides observations about constitutional rights in general.

The point of a discussion on liberty of person is not to argue for the abolishment of all coercive measures employed by the state. However, considering that all legal systems and traditions are vulnerable to abuse, guarantees against such abuse must be established, including tests for evaluating the lawfulness, necessity and proportionality of the deprivation of liberty. As such, the right to liberty of person as stipulated by *inter alia* UN International Covenant of Political and Civil Rights (ICCPR)⁴ Article 9, similarly with the right to life and right to privacy, does not put absolute limitations on state authority *per se*, nor does it "...grant complete freedom from arrest or detention."⁵ As opposed to other rights which prohibit certain state acts in more absolute terms, such as the prohibition of torture or the absolute nature of freedom of thought (see e.g. the non-derogable rights in ICCPR Article 4), the right to liberty of person places an obligation of states to formulate rules, competencies and procedures under which liberty may be deprived. Thus, the right to liberty of person is, as it should also be understood within the Chinese formal legislative context, a procedural right only really prohibiting arbitrary and unlawful

² There are a number of documents issued by the National People's Congress and its Standing Committee, as well as from local People's Congresses that make interpretative statements on constitutional provisions, however, none of these statements concern stipulated constitutional rights; see Zhou 2003, p. 223.

³ Qin and Chen 2004, p. 10.

⁴ China has so far only signed the ICCPR (1998.10.05) and the treaty is for this reason not binding for China. Under the Vienna Convention on the Law of Treaties (VCLT 1969), China is bound "not to defeat the object and purpose of a treaty" (VCLT art.18).

⁵ Joseph et al. 2004, p. 304.

deprivation of liberty.⁶ However, the nature of such procedural rights leaves the formulation of these procedural guarantees up to the state's discretion, allowing for a large margin of appreciation. Even to the point where enjoyment of the right is limited to legal formalism without concern for proportionality and reasonable justification; an issue, which has often been the object of criticism directed towards China and its legal regime.⁷

The first section of this study examines in broad strokes the applicability of the Chinese constitution, arguing for a possible interpretative coupling between constitutional rights and lower level legislation. The second section looks at constitutional rights theory in general. It elaborates on some of the basic premises for rights guarantees in Chinese constitutional law, including arguments made within Chinese academic discourse. The section aims at creating a general framework for the understanding of the subject matter, in particular touching upon the question of access to remedies as a basic principle of law. Based on these deliberations, the study then turns to the main argument and body of the work; making a fairly specific—although not exhaustive—analysis of substantive and procedural issues regarding the right to liberty of person as formulated in article 37 and reflected in lower level legislation. The third section is followed by observations related to both constitutional rights in general and on the right to liberty of person in particular. Throughout the paper individual references to international human rights treaty law will be made as comparative reflections to the Chinese perspective. These references are meant to illustrate particularities of the Chinese system, and where Chinese law and legal practice is challenged by international standards.

The overall focus will mainly be on the legal issues concerning rights-protection and constitutional development. However, the political nature of the constitution should perhaps warrant a stronger political orientation in the discussion below, and there may be many arguments as to why this should be so; the ideological argument for instrumental use of laws, government intervention in judicial procedure and the profoundly political nature of the constitution itself. Yet, in the often apparent tug of war between the legalization and the politicization of justice in China, there is growing room for legal arguments, and giving more space to these arguments seems warranted for the sake of taking Chinese law seriously.

1 Sources of law and the scope of study

The focus will mainly rest on the content and scope of national level legislation i.e. laws drafted and promulgated (*zhiding* 制定) by the NPC and NPC Standing Committee (NPCSC), described as “basic law” (*jiben falü* 基本法律)⁸ and “law”

⁶ Nowak 2005, pp. 211–212 and Yue 2007, pp. 60–62.

⁷ See for instance Potter 1994, pp. 325–358, where much of the discussion on legal formalism remains descriptive of the Chinese legal reality.

⁸ Basic law, here as *jiben falü* (基本法律), is distinct from the basic laws of Hong Kong and Macau, e.g. the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (中华人民共和国香港特别行政区基本法), adopted 4 April 1990.

(*falü* 法律) respectively.⁹ Following the Constitution¹⁰ and provisions of the PRC Legislation Law (2000, LL), no national administrative rules and regulations, issued by the State Council (LL Article 56), or local or autonomous regulations, or special rules (LL Article 63) may conflict with either constitutional provisions or national level legislation, thus justifying the relatively narrow legislative focus in this study. However, we will find that there are administrative rules and procedures in place that may impinge upon the enjoyment of the right in question and accordingly, a closer look is warranted—particularly at those, which actually conflict with higher level legislation.

Chinese jurisprudence on legislative implementation generally requires basic rights to be enforced through lower level legislation as applied by the courts.¹¹ This realization through the courts includes: rendering judgments (*panjue* 判决), publishing court bulletins (*tongzhi* 通知), and making judicial interpretations (*sifa jieshi* 司法解释), which again include general legal interpretations, formulated either as interpretations (*jieshi* 解释) or rules (*guiding* 规定), opinions (*yijian* 意见, or “guiding opinions” *zhidao yijian* 指导意见), and “replies” (i.e. *pifu* 批复, *dafu* 答复, *fuhan* 复函, *jieda* 解答, etc.). These “replies” are responses to questions by lower courts addressed to higher-level courts regarding the application of law in specific cases.¹² Although not legally binding they have a significant advisory effect and are widely published and cited in cases other than the case of the originating questions, effectively being *de facto* general judicial interpretations on the application of law. An analogy of this advisory mechanism may be a parallel of the advisory functions of the EU Court.

The most influential of these replies with regard to the justiciability of the constitution is the 1955 Supreme People’s Court reply (*fuhan* 附函) to Xinjiang High Court, advising against the direct application of the constitution in the determination of guilt and sentencing (*lunzui kexing* 论罪科刑) of criminal cases.¹³ This bar on the application of the constitution was later extended also to civil and economic cases in a 1986 reply (*pifu* 批复) from the SPC to Jiangsu High Court, *de facto* barring any direct application of the constitution in Chinese courts.¹⁴ However, there are arguments that this understanding of the two documents is

⁹ 中华人民共和国立法法 (PRC Legislation Law, hereafter LL) 1 July 2000, art. 7. English translations of legal texts are provided through the NPC Law Database (<http://www.npc.gov.cn/zgrdw/english/law/lawDBSearch.jsp>), other sources will be specified. All translated quotes of other Chinese texts are my own unless otherwise specified.

¹⁰ 中华人民共和国宪法 (PRC Constitution, hereafter Constitution), 12 April 1982, last amended 14 March 2004, art. 5, para. 3.

¹¹ Zhang 1999, p. 224 and Xu 1999, p. 148.

¹² There may be similarly titled advisory opinions forthcoming from other ministries and government organs, however, in the following text, the focus will only be on the judicial “replies”.

¹³ 最高人民法院关于在刑事判决中不宜援引宪法作论罪科刑的依据的复函 (Supreme People’s Court reply regarding inappropriate citation of the constitution as a source for determination of guilt and sentencing in criminal verdicts), 30 July 1955.

¹⁴ 最高人民法院关于人民法院制作法律文书如何引用法律规范性文件的批复 (Supreme People’s Court reply regarding how to incorporate normative documents in drafting legal documents by the People’s Courts), 28 October 1986.

exceedingly narrow and that they should not preclude constitutional cases, in any way. While the former only bars the application of the constitution in the “determination of guilt and sentencing” of criminal cases, and not other use of the constitution¹⁵; the latter document only prohibits the direct use of the constitution through omission as the Constitution is not listed among the permissible sources of law. Similar antithetical arguments towards the lack of reference to the Constitution in the listing of applicable legislation in criminal, civil and administrative procedure,¹⁶ are in other cases made as evidence towards the non-justiciability of the Constitution.¹⁷ However, these arguments towards exhaustive legislative enumeration are challenged by court practice, and at the same time allow some to argue that the prohibition is resting on a weak foundation.¹⁸ Several interpretative statements by the SPC over the years specifically invoke constitutional provisions and rights, e.g. two 1988 SPC replies (*pifu* 批复) making a constitutional argument in favor of worker’s rights,¹⁹ and a joint 1999 SPC and Ministry of Justice notice (*tongzhi* 通知) on equality before the law in relation to legal aid in civil cases.²⁰

Indeed, there are also a number of cases to be found where the courts actually make use of either general constitutional arguments,²¹ or specific application of

¹⁵ Wang 2000, p. 20.

¹⁶ 中华人民共和国刑事诉讼法 (PRC Criminal Procedure Law, hereafter CPL), 17 March 1996, arts. 182 and 189; 中华人民共和国民事诉讼法 (PRC Civil Procedure Law, hereafter CivPL), 9 April 1991, arts. 138 and 153; 中华人民共和国行政诉讼法 (PRC Administrative Litigation Law, hereafter ALL) 4 April 1989, arts. 52 and 53.

¹⁷ 夏捷 (Xia J) 对法院在案件审理中适用宪法的几点思考 (On the Use of the Constitution in Court Judgements) http://www.njfy.gov.cn/site/boot/jlly-mb_a2005112442683.htm Accessed 12 April 2011.

¹⁸ Hu 2002, p. 150.

¹⁹ 最高人民法院关于雇工合同“工伤概不负责”是否有效的批复 (Supreme People’s Court Reply regarding whether [the clause] “work injury will not be the responsibility [of the employer]” in employment contracts is valid), 14 October 1988; and the case 张连起、张国莉诉张学珍损害赔偿纠纷案 (Zhang Lianqi, Zhang Guoli v. Zhang Xuezheng), 24 December 1988, 塘沽区人民法院 (Tangku District People’s Court, Tianjin Municipality). This case is a bit peculiar as two replies with different wording were issued by the SPC regarding this case, cf. 最高人民法院关于雇工合同应当严格执行劳动保护法规问题的批复 (Supreme People’s Court reply regarding the strict implementation of labor protection laws and regulations in employment contracts) 14 October 1988.

²⁰ 最高人民法院, 司法部关于民事法律援助工作若干问题的联合通知 (Supreme People’s Court and the Ministry of Justice joint notice regarding some questions concerning legal aid in civil cases), 22 September 2005; cited in Zhou 2003, p. 250. Notice also found at <http://www.sft.yn.gov.cn/details.asp?ARTID=1062&COLID=153> Accessed 5 February 2008.

²¹ See, *inter alia*, 沈涯夫、牟春霖诽谤案 (Du Rong v. Shen Yafu and Mu Chunlin), 29 June 1987, 上海市长宁区人民法院 (Changning District People’s Court, Shanghai); 王红军不服阆中市公安局治安管理处处罚决定案 (Wang Hongjun v. Langzhong Public Security Bureau), 12 August 1999, 四川省南充市中级人民法院 (Nanchong City Intermediate People’s Court, Sichuan Province); 张连起、张国莉诉张学珍损害赔偿纠纷案 (Zhang Lianqi, Zhang Guoli v. Zhang Xuezheng), 24 December 1988, 塘沽区人民法院 (Tangku District People’s Court, Tianjin Municipality); 王发英诉刘真及《女子文学》等四家杂志侵害名誉权纠纷案 (Wang Faying v. Liu Zhen and Four Magazines Including Women’s Literature), 6 May 1989, 河北省高级人民法院 (High People’s Court of Hebei Province); 宜昌市无线电厂诉卢玲等四人终止劳动合同纠纷案 (Yichang Radio Factory v. Lu Ling et al.), 8 December 1999, 宜昌市中级人民法院 (Yichang Intermediate People’s Court, Hubei) in 中华人民共和国最高人民法院公报 (Gazette of the PRC Supreme People’s Court) 2000, No.6, 68 pp. 205–207; Donnelly 2003 and Chow 2003.

constitutional articles²² as justification of decisions. There are also other recent studies in China that point to cases, judicial interpretations and replies where the constitution is directly referenced by the courts as a source of law.²³ This assertion stands in stark contrast with the official emphasis on the non-justiciability of the constitution.²⁴

It has been noted, however, that constitutional provisions will never constitute the sole legal basis of a judgment, unless there are legislative lacunae that needs to be filled. In these cases the constitutional citation must be accompanied by a corresponding judicial interpretation, e.g. a SPC *pifu* (批复).²⁵ This thesis is largely based on the experience from the “Qi Yuling Case” (齐玉苓案, 2001), where a SPC reply made sole use of a constitutional provision—Article 46 on the right to education—as normative background, was issued. This reply was then used directly by the local High People’s Court as justification for its appeal decision, along with the constitutional provision, as the only substantive norm. Although this was hailed as a landmark case at the time, it did not invite an increase of cases making sole use of the constitution as a basis for litigation, and should probably be considered as an exception to, rather than a development of court practice.²⁶ The SPC withdrawal of the “Qi Yuling Case (齐玉苓案)” interpretation in a December 2008 decision leaves little doubt about the controversial nature of this case, and of constitutional cases in general.²⁷ Leaving an option where in cases where there is adequate lower level legislation, any reference to constitutional norms must be coupled with the corresponding legislation.²⁸

These cases and interpretations raise a number of interesting questions with regard to the role of the constitution in judicial processes in China, and we see that “constitutional cases” are not as rare as previously thought.²⁹ The coupling of constitutional norms and lower level legislation also describes the close relationship

²² See, *inter alia*, 刘明诉铁道部第二十工程局二处第八工程公司、罗友敏工伤赔偿案 (Liu Ming vs. the No. 8 Engineering Company of Division No. 2 of the No. 20 Engineering Bureau of the Ministry of Railways and Luo Youmin), 17 May 2001, 四川省眉山地区中级人民法院 (Meishan Prefecture Intermediate People’s Court, Sichuan Province) in 中华人民共和国最高人民法院公报 (Gazette of the PRC Supreme People’s Court) 1999, No.5, 61, pp.172–173. Constitution art. 41 (2); 龙建康诉中洲建筑工程公司、姜建国、永胜县交通局损害赔偿纠纷案 (Long Jiankang v. Zhongzhou Construction Engineering Co., Ltd.), 11 April 2000, 云南省永胜县人民法院 (Yongsheng County People’s Court, Yunnan Province). Constitution art.42(4); 齐玉苓诉陈晓琪等以侵犯姓名权的手段侵犯宪法保护的公民受教育的基本权利纠纷案 (Qi Yuling v. Chen Shaoqi et al.), 23 August 2001, 山东省高级人民法院 (High People’s Court of Shandong Province). Constitution art.46 (1).

²³ Zhou 2003, Wang 2004 and Han 2005.

²⁴ Hand 2009.

²⁵ Zhou 2003, p. 199.

²⁶ Anecdotal evidence tells of political repercussions after the conclusion of this case, eventually leading to a reemphasis of the prohibition to cite the constitution in court.

²⁷ 最高人民法院关于废止 2007 年底以前发布的有关司法解释 (第七批) 的决定 (Decision of the Supreme People’s Court on Abolishing the Relevant Judicial Interpretations (the Seventh Batch) Promulgated before the End of 2007), 18 December 2008. See also Chinese Law Prof Blog, 2009.01.12, http://lawprofessors.typepad.com/china_law_prof_blog/2009/01/supreme-peoples.html Accessed 13 January 2009.

²⁸ Zhou 1999.

²⁹ For a discussion on the dynamics of the existing constitutional cases see Malmgren (forthcoming).

between constitutional basic rights and law. Although this study has not found cases that make the full connection between Article 37 and lower level legislation, a general principle of coupling constitutional provisions and law has been sufficiently established to allow the use of related cases and legislation as interpretative tools for the right in question.³⁰

2 The nature of constitutional rights

Quite like constitutional debates elsewhere, complaints from within the Chinese academic community claim that a common understanding of what a constitution is and on the nature of basic constitutional rights is yet to be established, and that this is detrimental to the justiciability of the constitution.³¹ However, there are areas in which a basic consensus seems to exist.

Although Chinese law arguably has largely been removed from ideological constraints in the attempt to introduce a Weberian “rational” law,³² jurisprudence and in particular the constitutional rights theory seem to retain much of the ideological vocabulary. The principle of the reciprocal nature of basic constitutional rights and obligations (*yizhixing* 一致性 or *tongyixing* 统一性), found not only within Marxist theory but also amply demonstrated under early writing on rights in China,³³ usually described as the “unity of rights and duties,”³⁴ extends the direct limiting nature of constitutional provisions to citizens and not only to state organs—i.e. giving constitutional rights a *direct horizontal effect*.

Apart from a number of cases involving officials as defendants, and where a rights argument would be proper,³⁵ this principle is apparent in available case-law on deprivation of liberty where the verdict often makes the use of a rights language that the defendant has “violated the right to liberty of person of X” (*qinfan le X de*

³⁰ These “constitutional cases”, however, make it plausible that a challenge or decision implicating art. 37 could be made, if it has not been made already. For example, in the Lin Shuchao case (林树潮案) the court makes a direct reference to the constitutional right to liberty of person while discussing the severity of the Reeducation through labour (RETL) regime (“the highest form of administrative punishment”). However, the verdict does not make any further reference to lower level legislation. The case does establish, however, that the Hainan Intermediate People’s Court believes RETL to be within the scope of constitutional inquiry. (林树潮不服海南省劳动教养管理委员会劳动教养决定案) (Lin Shuchao v. Hainan Province Reeducation through labour Management Committee), 1999, 海口市中级人民法院 (Haikou City Intermediate People’s Court, Hainan Province), Wang 2005b, p. 76.

³¹ Lin 2000, p. 3 and pp. 42–44.

³² Chen 2008, p. 50.

³³ See e.g. 刘师培 (Liu Shiwei) 1905, 伦理教科书 (Textbook on Ethics), excerpts translated in Angle and Svensson 2001, p. 37.

³⁴ Chen 1999, p. 92 and Chen 2008, p. 133 where the argument remains the same.

³⁵ See e.g. 郝志敏不服青岛市、徐州市公安局限制其子罗军谊人身自由行政决定案 (Hao Zhimin v. Qingdao City and Xuzhou City Public Security Bureau), 28 December 1993, 江苏省高级人民法院 (High People’s Court of Jiangsu Province); 陈德光等诉琼山市公安局等治安一案 (Chen Deguang et al. v. Qiongsan Public Security Bureau et al.), 15 March 2000, 海南省高级人民法院 (High People’s Court of Hainan Province); 张树荣申请国家赔偿案 (Zhang Shurong Case), 14 April 2000, 北京市海淀区人民法院 (Haidian District People’s Court, Beijing); 曹建东申请国家赔偿案 (Cao Jiandong case), 19 December 2001, 北京市石景山区人民法院 (Shijingshan District People’s Court, Beijing) (All cases on file with author).

renshen ziyouquan 侵犯了某某的人身自由权).³⁶ This has the effect of basically rendering criminal acts between citizens as a violation of rights, sometimes even using the term “citizens’ rights” (*gongmin de quanli* 公民的权利). The principle makes reference to the formulation that “there are no rights without obligations, and there are no obligations without rights”³⁷ and that “in order to enjoy rights, one should shoulder corresponding obligations; and in fulfilling one’s duties, one will be given to enjoy corresponding rights.”³⁸ The latter statement makes it fairly clear that emphasis of the relationship between rights and obligations lies on the latter. In this vein it has been argued that the citizen’s obligations actually are the state’s rights,³⁹ or at least that state interests takes precedence over individual’s rights.

To render citizen’s rights and state power equal, turns the constitution into a direct means of limiting the actions of an individual, and in this way loses its function of balancing citizens’ rights and state power.⁴⁰ One may even argue that the state is placing itself above the constitution by projecting constitutional duties upon the individual. The problem of a direct horizontal effect of constitutional rights and duties is very far from unique to China, and the many questions that the issue poses have few—if any—readily available answers.⁴¹ Chinese jurisprudence seems, however, to accept this notion without much debate. Human rights debates outside China have made the link between communitarian rights arguments, where the protection of the many against the acts of the few is emphasized, and rendering rights and obligations on a horizontal level—thus weakening the position of the individual within the national framework of rights.⁴² Similarly we may make the same argument regarding constitutional rights in China; the individual has been the weaker part in any discourse on rights, both in theory and practice, and the state has been arguing for the legitimacy of limiting the rights of individuals in the interest of the “communal”, whether it be the society, state or masses.

This is confirmed in legal practise. While it is held that “all people” should enjoy the right to protection from infringements or unreasonable restrictions by the state and state representatives⁴³; state interests are placed before individual’s rights

³⁶ See e.g. 夏献法诉深圳市曼哈商业有限公司侵犯人身自由权、名誉权案 (Xia Xianfa v. Shenzhen Manha Trading Ltd.), 16 May 1996, 广东省深圳市中级人民法院 (Shenzhen Intermediate People’s Court, Guangdong Province); 张玉刚非法拘禁案 (Zhang Yugang case), 1 February 2007, 北京市顺义区人民法院 (Shunyi District People’s Court, Beijing); 张韬故意杀人、非法拘禁, 奚大震非法拘禁、包庇, 胡宇非法拘禁, 姜广毅包庇上诉案 (Zhang Tao et al. appeals case), 14 December 2000, 北京市高级人民法院 (Beijing Intermediate People’s Court); 黄永柱非法拘禁案 (The Case of Huang Yongzhu’s Unlawful Detainment), 18 September 2000, 海口市振东区人民法院 (Zhendong District People’s Court, Haikou City); 吉普色合非法拘禁案 (Ji Pu Se He case), 19 May 2000, 四川省普格县人民法院 (Puge County People’s Court, Sichuan Province); 周勇等故意伤害、抢劫、敲诈勒索、寻衅滋事、非法拘禁、非法持有、私藏枪支弹药案 (Zhou Yong et al. case), 9 November 2001, 四川省泸州市中级人民法院 (Luzhou City Intermediate People’s Court, Sichuan Province).

³⁷ Makesi Engesi xuanji [Selected Works of Marx and Engels], Vol.2, 137, cited in Dong 2004: 269.

³⁸ Xie 1999, pp. 53–54.

³⁹ Zhou 2001, p. 278.

⁴⁰ Zhang 2004, p. 28.

⁴¹ See e.g. Tushnet 2003, pp. 79–98.

⁴² Emberland 2006.

⁴³ Xie 1999, p. 33.

through Article 51, which covers among other matters, the limitation of basic rights based on the interests of the state, society and the collective, making effective and actual limitations on state powers questionable.⁴⁴

There is also a general consensus in the affirmation that both traditional Chinese political theory and socialist theory emphasize harmonious relations between the state and individual.⁴⁵ As such the perceived necessity for the existence of personal rights is very small.⁴⁶ According to a Chinese commentary this does not mean that necessity and existence of rights was negated in Marxist theory,⁴⁷ but that these rights exist only as citizen's rights stipulated by law, rather than as inherent or natural human rights.⁴⁸

When defining the scope and content of basic civil rights, it is often claimed that the political, economical and cultural level of development of the state, while in "the beginning stage of socialism", must be fully considered.⁴⁹ This differentiated and selective rights theory is not unique to the post-1949 legal discourse in China, as Angle and Svensson explain on the writings of Wu Jingxiong (John Wu, 吴经熊) from 1933; "[rights] are not universal, but have to suit the times and the needs of each individual society."⁵⁰ Equating this rights discourse with constitutional rights theory, it is implied that different from other Chinese constitutional norms, the broadening, narrowing, or any other development of the citizen's basic rights is dependent upon concrete, pressing national needs.

Examples of such needs are the inclusion of the clause stating that "personal dignity ... is inviolable,"⁵¹ which was added to the 1982 Constitution as a direct consequence of the Cultural Revolution.⁵² Another situation relates to when the right to freedom in choosing a place of abode and the freedom of movement as stipulated in the 1954 Constitution was abolished, which was thought justified as it was not considered possible to adjust life and production caused by a high concentration of people in the big cities.⁵³ The recent constitutional revisions on economy and economic reform (1988, 1993, 1999 and 2004), property (1988 and 2004), rule of law (1999) and human rights (2004) may well be perceived as reflections of the same instrumental nature of the constitution.

⁴⁴ Chen 1999, p. 93.

⁴⁵ Peerenboom 2002, pp. 78–79.

⁴⁶ Angle 2002, pp. 201–202, note footnote 22 on p. 202.

⁴⁷ Xia 2001, p. 207.

⁴⁸ Svensson 2002, p. 23 and Lin 2007, p. 80.

⁴⁹ Xie 1999, p. 53.

⁵⁰ Angle and Svensson 2001, p. 161, Wu Jingxiong later took a small part in the drafting process of the Universal Declaration of Human Rights along with the more famous Zhang Pengchun (张彭春, P.C. Chang) Morsink 1999, 103.

⁵¹ 中华人民共和国宪法 (1982) (Constitution of the People's Republic of China 1982), 4 December 1982, art.38: "中华人民共和国公民的人格尊严不受侵犯。 ..." (The personal dignity of citizens of the People's Republic of China is inviolable. ...)

⁵² Zhou 2001, p. 283.

⁵³ Dong 2004, p. 296.

Finally, the jurisprudence on rights in China proposes that citizen's basic rights are provided by the state,⁵⁴ and the responsibility of the state to guarantee or safeguard (*baozhang* 保障) these rights have seen a long-standing recognition in Chinese academia.⁵⁵ It was not until the 2004 revision of the Constitution and the inclusion of "the state respects and guarantees human rights"⁵⁶ as a new third paragraph in Article 33, that this principle received a firmer formulation within the constitution.⁵⁷ However, this amendment did more than just reaffirm a principle, the revision clarified two levels of state responsibilities in guaranteeing basic rights; First, "the state *respects*...human rights" implies a passive, or negative obligation, only requiring the non-action or non-interference of the state⁵⁸; Second, "the state... *guarantees* human rights" implies active, or positive obligations to ensure the enjoyment of a right either through legislation, or through other protective or coercive means, as was held also before the amendment.⁵⁹ This amendment mimics the language and structure of obligations in both international human rights law, e.g. ICCPR Article 2 (1), as well as formulations in other national constitutions, such as the Norwegian Constitution Article 110c.

The legislative responsibility of the state is to protect basic rights in two areas: first, it will generally provide valid legal guarantees that basic rights will not be violated by state organs; second, legislation should also provide individuals with guarantees for remedies against unlawful acts by other private individuals or entities⁶⁰—which can be understood as an *indirect horizontal effect* of rights obligations, a notion which is far more commonly accepted than the above discussed *direct horizontal effect* of constitutional provisions. Indeed, rights protection through legislative acts and lawful remedies are necessary parts of the obligations of state under international human rights law. In this regard one important underlying principle should be considered; access to effective remedies.

2.1 Remedies

Access to a remedy (*jiuji* 救济) in case of rights infringements carries the greatest significance in guaranteeing rights,⁶¹ yet in the language of Article 37 no such admission is directly made with regard to unlawful deprivation of liberty. However, article 41 creates the option of a right to remedy violations against any right stipulated by the constitution or law, where the first and second sentence of Article 41(1) formulates the basic right to bring forth complaints on rights violations

⁵⁴ Li 1999, p. 128.

⁵⁵ Quanguo renda changweihui bangongting yanjiushi zhengzhi zu 1996, p. 143.

⁵⁶ “国家尊重和保障人权” (The state respects and guarantees human rights).

⁵⁷ Constitution (2004), art.24.

⁵⁸ Jiao 2004, p. 46.

⁵⁹ Ibid., p. 47; Zhou 2003, p. 4.

⁶⁰ Lin 2007, p. 96.

⁶¹ Liu 2003, p. 52.

committed by state organs (including the executive, administrative, judicial and supervisory organs on all levels of the state) or by the representatives thereof (including all state organs leadership and ordinary employees).⁶² The complaints mechanisms involved include submitting criticisms and suggestions, appeals, or to bring forth charges with regard to violations of law or dereliction of duty.

However, the third sentence of Article 41 (1) renders rather a broad limitation in that "...fabrication or distortion of facts or for purposes of libel and false incrimination is prohibited."⁶³ This limitation is also found within the Criminal Law (CL),⁶⁴ and considering the experiences through other similarly formulated limitations regarding evidentiary rules and judicial procedure, and the difficulties associated in establishing the facts of a case and possibilities for government interference in adjudication,⁶⁵ one could imagine this formulation would create rather large possibilities for the state organs involved to refute any charge brought against them, and probably has a chilling effect on those wanting to take their claims to court. This should also be seen along with the challenges posed under subparagraph 2 of this article.

Article 41(2) formulates the duty of the relevant state organs, including competent administrative authorities, public security organs, judicial organs, including the Procuratorate,⁶⁶ to hear appeals, charges or reports brought forth by citizens. This paragraph renders a duty for state organs to investigate and handle any complaint, and in this way further protects citizens' right to appeal. The constitution forbids any form of repression or revenge (*baofu* 报复) towards the person issuing the complaint. However, recent studies and news reports on the plight of protesters and the challenges they face when trying to put forth complaints,⁶⁷ despite the prohibitions and limitations set by CL Article 254 on abuse of powers and similar CCP regulations,⁶⁸ indicate that the actual enjoyment of a right to a remedy against rights violations may be deeply challenged.⁶⁹

⁶² Quanguo renda changweihui bangongting yanjiushi zhengzhi zu 1996, p. 168. See also 中华人民共和国刑法(PCR Criminal Law, hereafter CL), 14 March 1997, art.93.

⁶³ Constitution (2004), art.41, para. 2.

⁶⁴ CL, art.243; Zhou 2001, p. 268.

⁶⁵ Lubman 1999, pp. 263–269. On the difficulties faced by lawyers in relation to art.306(3) and the question of coercing or enticing a witness into changing a testimony in defiance of the facts or give false testimony and the provisions used as a "tool" by the prosecution and the court; 周汉基 (Zhou H), 废止危害律师执业权之法条 (Abolishing provisions that jeopardise lawyers right to practise the law) <http://www.hanjilawyer.com.cn/meiye/yue6-02.htm>.

⁶⁶ Quanguo renda changweihui bangongting yanjiushi zhengzhi zu 1996, p. 169; Here the "judiciary" is limited to the People's Courts and the People's Procuratorate, there are however, arguments towards a much broader definition of the term, including the police, state security organs and even lawyers etc., see Chen 2004, p. 131.

⁶⁷ See e.g. Human Rights Watch 2005.

⁶⁸ Liu 1991, p. 46.

⁶⁹ See O'Brien and Li 2006, Chen and Wu 2006; China courts turn deaf ear to peasants' cases, The New York Times, 27 December 2005 (Accessed 28 December 2007); 中华人民共和国人民法院组织法 (Organic Law of the People's Courts) 31 October 2006; Seeking justice, dodging capture in Beijing, L.A. Times, 28 May 2007 (Accessed 29 May 2007).

Article 41(3) stipulates a general right to compensation for rights violations. This right has been further elaborated on in lower level legislation through e.g. State Compensation Law (SCL, 1994) and Administrative Litigation Law (ALL, 1989), Article 67.⁷⁰ With regard to the question of liberty of person, the scope for seeking compensation covers an act committed by any executive organ, or its functionaries, and cases of wrongful arrest. Detention or other forms of deprivation of liberty falls under the scope of administrative, criminal or civil compensation.⁷¹ There is, however, no applicable rule in the case of violations to the constitution, leaving it up to lower level legislation to foresee possible compensation needs. But then again, the above mentioned Qi Yuling case serves as an exception by awarding compensation to be paid by three public institutions (two schools and the local educational committee). It should be noted that this was a civil law case, and compensation was given for the expressed violation of the plaintiff's right to education.⁷² Whether or not this will eventually set a precedent, which permits compensation for violations that fall outside the scope of lower legislation, is far from clear.

3 Right to liberty of person as a constitutional right

The right to liberty of person may be perceived as a rather broad rights category, some include issues of human dignity, physical freedom, freedom of marriage, safety of home and residence,⁷³ while others believe that it should also include freedom and privacy of correspondence.⁷⁴ Yet others argue that the right to reputation and the right to privacy should be added as well.⁷⁵

The scope of liberty of person will be limited to the liberty or right to physical freedom (*renshen ziyou* 人身自由) as outlined in the language of article 37, which establishes the inviolable (*bu shou qinfa* 不受侵犯) right of citizens to liberty of person (para. 1); Paragraph 2 is limited to defining the scope of legal arrest (*daibu* 逮捕) and; Paragraph 3 stipulates a general prohibition against violations of citizen's liberty of person, the acts that fall within the scope of this right, apart from arrest, include detention, deprivation or restriction of citizens' freedom, and body searches.⁷⁶ The question is how to define and understand the rather broad terms of the provision.

⁷⁰ 中华人民共和国国家赔偿法(PRC State Compensation Law, hereafter SCL), 12 May 1994; Zhou 2001, p. 268.

⁷¹ Deng 2000.

⁷² 齐玉苓诉陈晓琪等以侵犯姓名权的手段侵犯宪法保护的公民受教育的基本权利纠纷案 (Qi Yuling v. Chen Xiaoqi et al.) See verdict rendered by Shandong Province High Court pt.3.

⁷³ Xie 1999, p. 145.

⁷⁴ Xu 1996, pp. 416–420.

⁷⁵ Zhou 2003, pp. 151–156.

⁷⁶ Quanguo renda changweihui bangongting yanjiushi zhengzhi zu 1996, p. 161.

“Article 37: Freedom of the person of citizens of the People’s Republic of China is inviolable.

No citizens may be arrested (*daibu* 逮捕), except with the approval (*pizhun* 批准) or by decision (*jueding* 决定) of a People’s Procuratorate or by decision of a People’s Court, and arrests must be made (*zhixing* 执行) by a public security organ.

Unlawful (*feifa* 非法) detention (*jujin* 拘禁) or deprivation (*boduo* 剥夺) or restriction (*xianzhi* 限制) of citizens’ freedom of the person by other means is prohibited, and unlawful search (*feifa soucha* 非法搜查) of the person of citizens is prohibited.”

3.1 The legal subjects

The first paragraph constitutes the main formulation of a right and to whom this right is addressed. As with most of the rights within the Chinese constitution, and following the tradition of many of the world’s constitution, the text of article 37 only provides for the rights of “citizens”. However, considering the development of domestic Chinese law through, *inter alia*, the state responsibilities shouldered through the ratification of international human rights instruments, and as we saw above, the inclusion of the term “human rights” into the constitution, the scope of subjects enjoying the right to liberty of person may be understood in a broader sense than in the past.⁷⁷

Article 33, para. 1 reads: “All persons holding the nationality (*guoji* 国籍) of the People’s Republic of China are citizens (*gongmin* 公民) of the People’s Republic of China [sic].” The term is further elaborated in the 1980 Nationality Law (NL); persons eligible for Chinese citizenship include: 1. Any person born in China or abroad who can show that either one or both parents is a Chinese national, regardless of “nationality” (*minzu* 民族).⁷⁸ This does not apply if one or both parents has permanent abode (*dingju* 定居) in a foreign country and the newborn obtains a foreign nationality at birth.⁷⁹ This provision follows the principle that China does not recognize dual citizenships.⁸⁰ However, as has for example been seen in a 2007 extradition case of a suspected terrorist, the politics behind the recognition of foreign citizenships of former Chinese nationals by the Chinese government seems to be rather inconsistent⁸¹; 2. Any person born in China whose parents are stateless or of uncertain nationality with fixed abode in China⁸²; 3. Foreign nationals and stateless persons willing to abide by China’s Constitution and laws, may apply for and obtain Chinese citizenship provided the applicant is a

⁷⁷ Han 2006, p. 136 and Chen 2008.

⁷⁸ 中华人民共和国国籍法 (PRC Nationality Law, hereafter NL), 10 September 1980, art.2. In Chinese the term *minzu* (民族), confusingly translated to “nationality”, although it normally points to the ethnic classifications of the peoples of China.

⁷⁹ Ibid., arts.4 and 5.

⁸⁰ Ibid., art.3.

⁸¹ Canada angry at Uighur sentence, BBC News, 20 April 2007, <http://news.bbc.co.uk/1/hi/world/asia-pacific/6574517.stm> (Accessed 3 June 2007); Amnesty International, China: Canadian Uighur sentenced to life in prison www.amnesty.org/en/library/info/ASA17/018/2007/en, 19 April 2007.

⁸² NL (1980), art.6.

near relative of a Chinese person (*Zhongguo ren* 中国人), has permanently settled in China, or has other legitimate reasons.⁸³

In listing the subjects of basic rights, Chinese constitutional theory often focuses on the term “particular subjects” (*teding zhuti* 特定主体), referring to persons who are specifically pointed out in the constitution to enjoy particular rights, e.g. women and children,⁸⁴ overseas Chinese,⁸⁵ or members of national minorities.⁸⁶ The language of the constitutional provision on liberty of person is phrased in general terms without mention of any particular group of people beyond citizens. However, looking at statutes on the status of state organ personnel, we find that there are groups that do enjoy an additional level of protection, e.g. NPC delegates (discussed below). Such additional levels of protection or degrees of immunity, for members of legislatures are quite common in many jurisdictions, e.g. France, Brazil or the Czech Republic.

4 “Arrest”

Paragraph 2 of Article 37 only relates to the procedural guarantees qualifying a lawful arrest (*daibu* 逮捕). This term must be understood as an “autonomous concept”—to borrow from the European human rights terminology—in the sense that its meaning reflects a very specific form of deprivation of liberty that differs from the common use of the term under most other national jurisdictions. Whereas “*juliu* 拘留” (detention) may be understood in a conventional way, the term “*daibu* 逮捕” cannot. Different from the term under international treaty law, or common use, where both “arrest” and “detention” describes any act of deprivation of liberty by an authorized government organ or personnel (including holding mentally ill

⁸³ Ibid., art.7. Mo Jihong has argued that following the 2004 inclusion of “human rights” into the constitution, rights should be made equally applicable to all, and that this amendment was a continuance of a trend under the 1982 constitution to recognize foreigners as subjects of the rights enumerated in the document (Mo 2005, p. 148). On another hand, the limitation of the enjoyment of rights to “citizens”, with the exceptions of art.32 regarding the protection of the lawfully given rights and duties of foreigners within China’s borders, and art.50 on foreign ethnic Chinese, has been suggested to reflect a general view that foreigners cannot make claims against constitutional basic rights (citizen’s rights) that are not explicitly formulated as such (Zhou 2003, p. 27). Others, while inferring that Chinese constitutional rights are indeed human rights, invoke art.32 of the constitution to extend the scope of basic constitutional rights well beyond the “citizen” (Liu et al. 1999, p. 6). A possible understanding of this would be a differentiation of rights as human rights and rights as basic citizen’s rights, where the human rights portion of the constitutional rights are conceivably applicable to all, and the basic rights only available to the enjoyment of citizens. This differentiation then would reflect a distinction found within international human rights law, e.g. with regard to the understanding of democratic rights, and the recognition of foreigners as subjects under the state’s treaty obligations would also be an issue of customary international law or even peremptory international law (*jus cogens*) (Cassese 2005, p. 123), however, without any clear statement of such application of Chinese constitutional rights with regard to foreign nationals, this point may be moot.

⁸⁴ Constitution (2004), art.49.

⁸⁵ Ibid., art.50.

⁸⁶ Ibid., art.4.

patients in psychiatric facilities⁸⁷), the term under Chinese law only describes a very specific stage of criminal procedure. The details of this will be discussed below. The distinction between the common use and Chinese understanding of “arrest” becomes even more clouded as the official Chinese language version of both the Universal Declaration of Human Rights (UDHR) and the ICCPR Article 9 in both cases, use “*daibu*” in translation of “arrest”, adding to the challenge that China is facing in ratifying the ICCPR.⁸⁸

The question is whether or not China chooses to acknowledge the obvious lack of procedures and institutional design to be “brought promptly before a judge or other officer authorized by law to exercise judicial power”,⁸⁹ i.e. an authority which is independent, objective and impartial in relation to the issues dealt with, for the purpose of approving the continued deprivation of liberty.⁹⁰ The other option, to actively seek a *habeas corpus* hearing before a court “in order that [it] may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”,⁹¹ is not immediately available under Chinese law. However, the Criminal Procedure Law does allow challenges to the duration of ongoing detention,⁹² and administrative cases against the government have been heard on the legality of imposed coercive measures, or for compensation following such detention.⁹³ The reality of such cases being brought to court, however, are usually considered to be quite slim and difficult to achieve. This will be further discussed below.

The Chinese mechanisms to control acts of deprivation of liberty are even further removed from the international standards. The power to decide on the lawfulness of the arrest is delegated to the People’s Procuratorate. Despite Chinese protestations to the contrary, the dual role of the Procuratorate to both prosecute crime and supervise the administration of justice, causes obvious conflicts of interest, especially with regard to deprivation of liberty. In addition, there are questions of

⁸⁷ UN Human Rights Committee, “HRC General Comment no.8: Right to liberty and security of persons (Art. 9),” (1982).para.1; Nowak 2005, p. 219.

⁸⁸ For a discussion on the linguistic challenges facing Chinese official translations of international treaty law, and the problem of two official texts of the ICCPR see Sun 2006. It should be noted that the formal Chinese version of the ICCPR and the later unofficial version; i.e. the one originally translated and approved by the General Assembly in 1967 when the Republic of China government held the “China seat” in the UN, and a later Chinese language version that appeared in the early 1970’s, both of which are found in UN treaty collections, use this term. This may indicate that the original translation from 1967 was believed to convey the intended meaning of the treaty. The term “*daibu*” (逮捕), along with the term “*juti*” (拘提) (a term not used in PRC law meaning “arrest”) in the Taiwan Code on Criminal Procedure can be understood to be “arrest” in the same sense as described in international law - making the translations of “arrest” into “*daibu*” in the UDHR and the ICCPR more understandable (See 台湾刑事诉讼法 (Taiwan Code on Criminal Procedure), 2007), Sect. 1, chapter 8, <http://law.moj.gov.tw/Scripts/newsdetail.asp?no=IC0010001> Accessed 9 January 2008.

⁸⁹ ICCPR art.9(3).

⁹⁰ Kulomin v. Hungary, Communication No.521/92 (1996).

⁹¹ ICCPR art.9(4).

⁹² CPL 1996, art.70.

⁹³ 林树潮不服海南省劳动教养管理委员会劳动教养决定案 (Lin Shuchao v. Hainan Province Reeducation through labour Management Committee), 1999.

independence and the ability of the police and judiciary as a whole to withstand political pressure during more or less perpetual anti-crime and “strike hard” campaigns, leading to stronger punitive responses from the state against crime and eventually to a lower threshold for deprivation of liberty and arrest.⁹⁴ Even if the Procuratorate could have resolved the conflict of interest between the supervisory and prosecutorial powers, and although there is a general prohibition against intervention by administrative organs, public organizations or individuals (*xingzheng jiguan* 行政机关, *shehui tuanti he geren* 社会团体和个人) in the work of the courts and Procuratorate,⁹⁵ it has been noted that the leadership of the Party over the judicial organs has been “constantly asserted,”⁹⁶ leaving the judiciary as a whole open to direct political intervention through what has been described as a “deliberate contradiction.”⁹⁷ While there are arguments from within China that intervention in court practice by the CCP and the Political-Legal Committees (*zhengfa weiyuanhui* 政法委员会) on corresponding levels has decreased over the last decade. It has, however, been suggested in a recent study that this de-politicization of the courts is quite limited and that there is a renewed emphasis on the “political color” of the courts and the legal system in general.⁹⁸

4.1 Decision and approval

The legislation covering “arrest” follows the constitutional provisions quite closely; only three state organs may initiate and carry out an arrest: the People’s Procuratorate, the People’s Court and the public security organs (police). An arrest starts at the point after the approval or decision of the People’s Procuratorate, or through a decision by the People’s Court at the time of court proceedings.⁹⁹ The “approval” by the People’s Procuratorate refers to the basis for an arrest of a suspect made in the course of the investigative (*zhencha* 侦察) stage of a criminal case—most usually after the suspect has already been detained by the Public Security Bureau. “Decision” refers to an act by the People’s Procuratorate or People’s Court regarding the need to hold or apprehend a criminal suspect at the time of making formal charges (*li’an* 立案) or during the hearing (*shenli* 审理) of a case.¹⁰⁰ The authority to perform such approvals or decisions may not be delegated to other state organs.¹⁰¹

⁹⁴ See e.g. discussions in Trevaskes 2002 and Tanner 2007, p. 174.

⁹⁵ Constitution 2004, art.126; 中华人民共和国人民法院组织法 (PRC Organic Law of the People’s Courts), 31 October 2006, art.4; and 中华人民共和国人民检察院组织法 (Organic Law of the People’s Procuratorate), 2 December 1986, art.9.

⁹⁶ Chen 2008, p. 321.

⁹⁷ Human Rights Watch 2008, p. 17.

⁹⁸ Liebman 2007, pp. 627–628.

⁹⁹ CPL 1996, art. 68, see also Quanguo renda changweihui bangongting yanjiushi zhengzhi zu 1996, p. 162.

¹⁰⁰ Ibid.

¹⁰¹ 中华人民共和国人民检察院组织法 (PRC Organic Law of the People’s Procuratorate), 2 September 1983, art.12 and 人民检察院刑事诉讼规则 (People’s Procuratorate Rules on Criminal Procedure, hereafter SPP-CPL), 18 January 1999, art.92.

We find, however, that there are some exceptions or even some added “thickness” to these approval procedures. *Inter alia*, delegates of the NPC and delegates of the People’s Congresses at and above county level, cannot be arrested (*daibu*) without the consent of the Presidium (*zhuxituan* 主席团) of the relevant People’s Congress (PC), or when the PC is not in session the consent of the Standing Committee of the PC is required. Furthermore, if a delegate is detained because of a crime, the public security organ has to report it to the PC organs immediately.¹⁰² With regard to the arrest, criminal verdict, or other deprivation of liberty of village or township level PC delegates, the public security organ shall report it to the same level PC; however, prior notification or permission from the People’s Congress will not be required.¹⁰³ This is, however, provided that the delegate is not a CCP member and therefore subject to the CPP’s internal disciplinary hearings and extra-legal detention—or *shuanggui* (双规), which will be discussed further below.

In the case of “Jiao Chunsheng and others unlawfully detaining a People’s Congress deputy”¹⁰⁴ the prosecution argued for unlawful deprivation of liberty due to lacking notification to the local PC based on reading Article 35 of the Organic Law of the Local People’s Congress and Local People’s Governments of the PRC together with CL Article 143 (CL Article 238 after the 1997 amendment), claiming that the acts concerned had “severely violated” (*yanzhong qinfan* 严重侵犯) the legal rights of the victim. The defense claimed that the 8-days deprivation of liberty was lawful as it was instituted during a formal “detention and investigation” (*shourong shencha* 收容审查)¹⁰⁵ procedure. Changchun People’s Court agreed with the prosecution’s submissions, but chose to render a verdict based solely on the Criminal Law not making use of the specific legislation covering NPC delegates.

Another exception to the general arrest procedures is found in CPL Article 63, allowing “citizens arrest”. When encountering a person committing a crime or upon discovering a person immediately at the scene of the crime, a person who is wanted for arrest, or a person who has escaped from prison or is being pursued for arrest etc., anyone (*renhe ren* 任何人) has the right to immediately seize and deliver a criminal suspect to the police (PSB), People’s Procuratorate, or People’s Court.¹⁰⁶

Quite unsurprisingly, this does not mean that one has the right to act as a substitute for the police. This principle has been explicitly formulated in a first

¹⁰² 中华人民共和国全国人民代表大会组织法 (PRC Organic Law of the National People’s Congress), 10 December 1982, art.44; 中华人民共和国地方各级人民代表大会和地方各级人民政府组织法 (2004 修正) (PRC Organic Law of the Local People’s Congress and Local People’s Governments at various levels (2004 Revision)), 27 October 2004, art.35; see also 中华人民共和国全国人民代表大会和地方各级人民代表大会代表法 (PRC Law on Deputies to the National People’s Congress and to the Local People’s Congresses at Various Levels, hereafter Law on Deputies), 3 April 1992, art.30, paras. 1 and 2.

¹⁰³ Law on Deputies 1992, art.30, paras. 1 and 2.

¹⁰⁴ 焦春生等人非法拘禁人大代表案 (Jiao Chunsheng et al. case), 5 March 1993, 长春市中级人民法院 (Changchun City Intermediate People’s Court).

¹⁰⁵ *Shourong shencha* (收容审查), or *shoushen* (收审), was a measure for the police to hold suspects indefinitely for investigative purposes. The measure was abolished along with the 1996 Criminal Procedure Law amendment, at least nominally, see Wong 1996.

¹⁰⁶ CPL 1996, art.63. This provision follows the exact wording found in the 1979 “Regulations of the People’s Republic of China on Arrest and Detention” (*Daibu juliu tiaoli* 逮捕拘留条例), which was superseded by the 1996 revision of the CPL.

instance decision under a Sichuan municipal court decision where a person acting as a policeman unlawfully detained and questioned a person suspected of committing a crime. The court said that such conduct was “...to use unlawful (*feifa* 非法) methods of investigation, to unlawfully deprive someone of their liberty in a confined room (*liuzhishi* 留置室), this act constitutes the crime of unlawful incarceration (*feifa jujin zui* 非法拘禁罪).” The first instance decision was upheld in the second instance.¹⁰⁷ This ruling would perhaps be exotic were it not for the recently reported problems of “false police officers” and volunteer vigilante groups,¹⁰⁸ or the issue of the PSB owned private security companies (*ba’ an fuwu gongsi* 保安服务公司), the employment of auxiliary police (*xiejing* 协警) and their role in maintaining public order, among many other things.¹⁰⁹

In addition to arrest, measures for deprivation of liberty in criminal justice proceedings include forced summons (*juchuan* 拘传) and criminal detention (*xingshi jülüu* 刑事拘留), including criminal judicial detention (*xingshi sifa jülüu* 刑事司法拘留).¹¹⁰ Measures that may substitute arrest by merely restricting a citizen’s personal freedom include bail (*qubao houshen* 取保候审) and residential surveillance (*jianshi juzhu* 监视居住, a form of “house arrest”).¹¹¹ The latter is a form of “soft detention” (*ruanjin* 软禁) that often is thought to transgress on the limits of legality. As the public security organs may impose such soft detention at will the potential level of arbitrariness of this sanction is similar to the unlawful government practices further discussed below.

The nature of these measures is for the “prevention” of violations of public, social or personal interests; moreover it may be invoked to prevent escape, false testimony, or other concerns prior or during criminal proceedings. In the CPL the following situations are listed as legitimate grounds for criminal detention by the public security organ (police), if the suspect is “(1) ...preparing to commit a crime, is in the process of committing a crime or is discovered immediately after committing a crime; (2) if he is identified as having committed a crime by a victim or an eyewitness; (3) if criminal evidence is found on his body or at his residence; (4) if he attempts to commit suicide or escape after committing a crime, or he is a fugitive; (5) if there is likelihood of his destroying or falsifying evidence or tallying confessions; (6) if he does not tell his true name and address and his identity is unknown; and (7) if he is strongly suspected of committing crimes from one place to another, repeatedly, or in a gang.”¹¹² The People’s Procuratorate may also order criminal detention of suspects in cases handled directly by the Procuratorate,¹¹³ this

¹⁰⁷ 吴心苏非法拘禁案 (Wu Xinsu case), 13 October 2000, 四川省广元市中级人民法院 (Guangyuan City Intermediate People’s Court, Sichuan Province).

¹⁰⁸ Former Military Doctor Shot Dead in Row Over ID, South China Morning Post, 14 November 2007; Vigilante Escapes Charges Over Death of Suspected Thief, South China Morning Post, 21 November 2007.

¹⁰⁹ In Harm’s Way, South China Morning Post, 12 October 2007; see also Dutton 2005.

¹¹⁰ Long and Yang 2003, pp. 274–293.

¹¹¹ CPL 1996, art.51.

¹¹² CPL 1996, art.61.

¹¹³ Ibid., art.132.

usually involves cases where state officials are suspected of corruption and abuse of powers.¹¹⁴

When executing these coercive measures, and as proof of the legality of the use of the coercive measure, the public security organs, who may also be assisted by the judicial police—*sifa jingcha* (司法警察) of the People's Procuratorate and People's Court, must present a detention permission or proof of decision, either as a "summons warrant" (*juchuan zheng* 拘传证), "detention warrant" (*juliuzheng* 拘留证), or "arrest warrant" (*daibu zheng* 逮捕证).¹¹⁵ The use of criminal detention is limited to the investigation (*zhencha* 侦察) period in the criminal procedure, and it is further only to be applied by the public security organ and the Procuratorate. These permits or decisions, except for criminal judicial detention (*xingshi sifa juliuzheng* 刑事司法拘留), do not involve the court.¹¹⁶ Criminal judicial detention, however, differs in that it is imposed by the courts in response to threats to the order of the court, and its procedural guarantees are similar to the procedure under civil judicial detention (*minshi sifa juliuzheng* 民事司法拘留) that will be discussed below. CPL does not open for supervision of criminal detention by the people's court, with the obvious exception of criminal judicial detention, as it only stipulates internal supervisory procedures of permissions or decisions. The legality of any of the criminal detention measures, including arrest, is to be guaranteed only through procedures requiring the police or the Procuratorate to interrogate the suspect within 24 h of detention to determine the facts of the case, and potentially ensuring the release of the suspect if a case cannot be established (*li'an li'an* 立案).¹¹⁷ In case the police find reason for continued detention it may apply the Procuratorate for arrest approval. However, what should be noted is that while the Procuratorate evaluates the application for arrest, the organ is only looking at whether or not there is sufficient evidence for establishing a case; to the necessity of the arrest is something that the Procuratorate "normally does absolutely not take into consideration" (*yiban bing bu kaolü* 一般并不考虑).¹¹⁸ In protecting the liberty of person, these procedural rules are only relying on rather ineffective internal supervisory mechanisms between the police and the Procuratorate, and it has been pointed out that "[i]n practice ... unlawful detention or arrest ... [is] hard to discover by people outside the executing organs."¹¹⁹

4.2 Time limits

The Criminal Procedure Law also stipulates that within 24 h, public security organ should inform the family members or unit (*danwei* 单位) to which he or she belongs

¹¹⁴ Wang 2005a, p. 358.

¹¹⁵ 公安机关办理刑事案件程序规定 (Rules of Procedures for Public Security Organs Handling Criminal Cases, hereafter MPS Rules), 14 May 1998, arts. 61, 106, 123; 人民检察院司法警察执行职务规则 (Rules on Executive Functions of the People's Procuratorate Judicial Police) (experimental), 18 June 2001, arts. 12 and 13, para. 2.

¹¹⁶ Long and Yang 2003, p. 284.

¹¹⁷ CPL 1996, arts. 65 and 72.

¹¹⁸ Wang 2005a, b, c, p. 147.

¹¹⁹ Yue 2005, p. 82.

on the reasons of detention and place of custody—except under circumstances when such notification would hinder the investigation or there is no way of notifying them.¹²⁰ However, this rule does not lead to effective public monitoring, as there are no mechanisms for ensuring that the police actually report deprivations of liberty, and the possibility for abuse of power still exists. Several widely publicized cases point to this lack of supervision with police detention, where persons have been held by the police for long periods of time, sometimes without formal charge or arrest, and in some extreme cases up to 3, 14 or even 28 years,¹²¹ but in another case a period of only 24 h of detention during interrogation was sufficient to be labeled “extended detention” (*chaoqi jiya* 超期羁押) by the court.¹²²

Formally, article 69 of the CPL stipulates that the police must apply for arrest approval within 3 days but that in particularly complex cases this time limit may be extended to 30 days. As the Procuratorate has 7 days to approve the application for formal arrest, the extreme lawful length in police custody may reach 37 days. Human Rights Watch has found that the public security organs applied this period to “all pre-arrest detention indiscriminately.”¹²³ As for arrest, there are no specific stipulations on time limits outside the investigative (*zhencha* 侦查) stage.¹²⁴ This period may reach three and a half months.¹²⁵ In handling “extended custody” cases only the investigative stage of a criminal proceeding will be investigated, and up to the end of 2003, the People’s Courts cleared 4.100 cases of extended custody, involving 7.658 persons.¹²⁶ It has been found, however, that despite initiatives to reduce instances of extended custody, the absolute numbers do not seem to have any significant reductions.¹²⁷ A chapter in the same study also found a significant relationship between the early access to lawyer and abuse of powers, in particular at the time of first detention by the police and including extended detention.¹²⁸ Under the present CPL access to a lawyer is not granted at this stage, however, this is not an issue within Article 37 as any inferred reference to legal representation is only buried in Article 125, chapter 4, of the Constitution. Along with the requirement that trials should be held in public (cf. ICCPR Article 14), and only then under the

¹²⁰ CPL 1996, art.64 and 71.

¹²¹ The latter case, 谢某国家赔偿案 (Xie Hongwu State Compensation Case) (2003), led to much debate in China and in a commentary published on the People’s Daily web-site the case was pointed out as one of the most important cases in China’s rule of law development. The plaintiff, Xie Hongwu was detained in 1974 charged with keeping reactionary leaflets supposedly dropped by airplane over his small village and only released in 2002 with a declaration of innocence, <http://legal.people.com.cn/GB/42735/5014063.html> Accessed 13 August 2010. See the cases noted in Wang 2005a, b, c, p. 147; see also Human Rights Watch 2001, pp. 48–49.

¹²² 上官建伟不服河南省浚池县公安局治安管理处行政处罚裁决案 (Shangguan Jianwei v. Mianchi County PSB), 27 January 1997, 河南省浚池县人民法院 (Mianchi County People’s Court, Henan Province).

¹²³ Human Rights Watch 2001, p. 48.

¹²⁴ Shen 2005, p. 68.

¹²⁵ Yue 2005, p. 84.

¹²⁶ Statistic published in Shen 2005, p. 67.

¹²⁷ Chen 2005, p. 92.

¹²⁸ Fan 2005, pp. 368–369.

formulation that “the accused has the right to defense,” there are no specific entitlements to actual legal representation by a lawyer in the constitution.

However, CPL does provide recourse measures for challenging extended custody. Article 75 stipulates: “If the compulsory measures adopted by a People’s Court, a People’s Procuratorate or a public security organ exceed the time limit prescribed by law, the criminal suspect or defendant, his legal representatives, near relatives, or the lawyers or other defenders entrusted by the criminal suspect or defendant shall have the right to demand cancellation of the compulsory measures.” However, the specific rules for making use of this procedure are absent from the CPL, and their operation relies solely on personal resources, ability and knowledge. Furthermore, that there are no clear stipulations on either internal or external monitoring, creating effective guarantees that a person will not be subjected to extended custody, may be one of the important factors to explain why custody beyond the time limits stipulated by the law is very frequently seen.¹²⁹

4.3 Legality

The final paragraph of Article 37 involves the question of deprivation of liberty in a broader sense, not only referring to deprivation of liberty as following criminal proceedings, but also in administrative and civil proceedings, as well as on the “horizontal” level. In the following, these terms will be discussed further, but first at a note on legality.

The principle of legality of the right to liberty of person is clearly, although negatively, formulated in Article 37 through the general prohibition of *unlawful* (*feifa*) deprivation of liberty. The principle of legality has been described by a NPCSC working group led by the late Prof. Cai Dingjian (蔡定剑) as carrying two separate aspects of legality, namely that the acts are either “illegal” (*weifa* 违法) or “unlawful” (*feifa* 非法).¹³⁰ “Illegal” refers to any act of deprivation of citizen’s liberty by any person which is not competent to do so by law.¹³¹ “Unlawful” on the other hand, refers to unlawful acts when anyone, including government representatives, public security organs, the Procuratorate or Courts make use of extra legal means, or powers, to deprive a person of her freedom *ultra vires*.¹³² Although one could wish that these terms were consistently used, we do find that persons committing acts that could be considered *illegal*, are punished for *unlawful* acts—and vice versa, as we will see below. However, for the purpose of this discussion the distinction plays an important role. While private citizens are usually not permitted to deprive anyone of their liberty through specific prohibitions, state organs will

¹²⁹ Chen 2005, p. 91.

¹³⁰ Quanguo renda changweihui bangongting yanjiushi zhengzhi zu, ed., 1996, p. 162.

¹³¹ See commentary in 李金胜诉偃师市公安局非法限制其人身自由案 (Li Jinsheng v. Yanshi city PSB), 26 May 1997, 河南省偃师市人民法院 (Yanshi City People’s Court, Henan Province). (Legislative Office of the State Council PR China) <http://law.npc.gov.cn/Accessed> 8 February 2005. Case on file with author.

¹³² Quanguo renda changweihui bangongting yanjiushi zhengzhi zu, ed., 1996, p. 162.

need to find specific legislation that allow deprivations of liberty, which makes the question of lawfulness the core of the principle of legality.¹³³

The principle of legality is the basic ground for preventing arbitrariness in deprivation of liberty, but if lacking the general constraints of proportionality and necessity of the adopted means, the law itself, or the understanding thereof, may be flawed by ideology or instrumentalist application of law. Consequently, rather than creating guarantees against arbitrariness, the unqualified requirement of legality actually lends a hand in the creation of legal formalism, and we remain unable to decide whether a certain coercive measure stipulated by the law is reasonable or proportionate. As China has not established an effective system for constitutional review, examining the constitutionality of coercive measures remains largely an academic exercise.¹³⁴

One of the most problematic areas with regard to legality of deprivation of liberty in China is found within the police's powers to employ administrative coercive measures.¹³⁵ These coercive measures include, *inter alia*, administrative detention (*xingzheng jülü* 行政拘留), isolation for compulsory drug treatment (*qiangzhi geli jiedu* 强制隔离戒毒, ICDT), replacing forced drug rehabilitation (*qiangzhi jiedu* 强制戒毒),¹³⁶ detention for education (*shourong jiaoyu* 收容教育, DE), reeducation through labour (*laodong jiaoyang* 劳动教养 or *laojiao* 劳教, RETL). Furthermore,

¹³³ Mo 2004, pp. 113–114. Original emphasis, my translation. A Chinese scholar has made a distinction in constitutional theory between the “surplus power principle” (*shengyu quanli yuanze*, 剩余权力原则) and “surplus rights principle” (*shengyu quanli yuanze*, 剩余权利原则). The former is a formulation of *ultra vires* referring to “the negation of the legitimacy of state power existing outside [the scope of] the constitution, meaning that with regard to the actions of state organs in charge of public services, any act *not stipulated* by the constitution is prohibited”—or any other law for that matter. The latter term “acknowledges the legitimacy of freedom outside [the scope of] the constitution, namely: to citizens, anything *not forbidden* by the constitution is permitted.” This argument was made by Mo Jihong while discussing the limitations on state power and individual liberties, which in many ways is the other side of the coin in relation to the questions regarding legality (as in illegal or unlawful).

¹³⁴ Tong 2004, reproduced in 人大复印资料, 宪法与行政法 (RUC Reprints, Constitutional and Administrative Procedure Law), no. 1, 2005, p. 28. In an introduction to the Chinese system for examining violations of the constitution, Mr. Li Fei, erstwhile assistant director of the NPC Standing Committee (NPCSC) Legislative Affairs Commission, referred to the review procedure under art. 90(2) of the Legislation Law, stating that “any citizen can request the National People’s Congress and its Standing Committee to examine violations against the constitution” (进行违宪审查的要求). Furthermore, that “regarding doubtful laws, the legislative organ (立法工作机关) of the National People’s Congress should first make its examinations (审查), and if [the doubtful law] is confirmed unlawful or unconstitutional, the relevant provision may be abolished, or the organ who formulated the stipulation may be requested to correct it”. The article did not discuss the effectiveness of this system. Others however, have demonstrated that despite numerous applications for review under this system of constitutional review, and there being some positive aspects in this system being the only “acceptable forum for constitutional challenges,” these appeals are yet to receive an official response, and at least in the short term these arguments seem “limited or even non-existent” (Hand 2007 cites at least 37 requests since the system was established under art. 90(2) of the Legislation Law in 2000; see also Hand 2009).

¹³⁵ For a more complete discussion on administrative measures see Biddulph 2007.

¹³⁶ 全国人大常委会关于禁毒的决定 (The National People’s Congress Standing Committee decision on strict prohibition of drugs), 28 December 1990, was replaced by the new law 中华人民共和国禁止毒品法 (PRC Law on the strict prohibition of drugs) that came into effect on 1 June 2008. For a discussion on the development and reform of the forced drug treatment regime in China see Sapio 2008a.

the criminal sanction “detention for reeducation” (*shourong jiaoyang* 收容教养)¹³⁷ applicable to juveniles from 14 years but not yet 16 year of age, has been institutionalized within RETL camps since 1996.¹³⁸ Placing this criminal sanction within an administrative system may be indicative of the reformatory objectives of this particular sanction, however, little is known about its scope and operation.

Different from the coercive measures under criminal procedure, most of the administrative coercive measures are not “preventive”, but rather either penal or reformatory. The scope of normative sources for these measures include legislation on administrative detention such as the Administrative Punishment Law (APL),¹³⁹ and State Council or NPCSC decisions, e.g. the State Council’s “Decision on reeducation through labour”¹⁴⁰ and the detention for education (*shourong jiaoyu* 收容教育) system established by the NPCSC’s “Decision on the strict prohibition of prostitution”.¹⁴¹ Other administrative measures for deprivation or restriction of liberty of person include, coercive hospitalization (*qiangzhi zhiliao* 强制治疗), and coercive isolation (*qiangzhi geli* 强制隔离). These latter measures, however, are not by nature penal, but should be understood as preventive coercive measures. Although most of these coercive measures have a certain “reformatory characteristic” in common, as their objective is to *inter alia* educate people engaged in prostitution, and help addicts to stop using drugs,¹⁴² the adopted means arguably holds a certain punitive nature, in particular as these measures are often connected to RETL.

According to the article 9 of the APL, administrative penalties that make use of deprivation of liberty of person can only be formulated by law. This stipulation reflects the Legislation Law that expressly prescribes that any deprivation of liberty must exist in “law” (*falü* 法律, LL Article 8(5)), and that this law must be a “basic law” (*jiben falü* 基本法律) passed by the NPC itself (Article 9) and not by its standing committee. However, RETL and DE are not established by law, as required. The document establishing RETL clearly lacks the legal position required by the LL. Therefore, in order to correct this issue of legality an “illegal acts corrections law” (*weifa xingwei jiaozhi fa* 违法行为矫治法) has been proposed, and it was placed on the legislative calendar for 2005 of the National Standing

¹³⁷ CL 1997, art.17(4).

¹³⁸ 司法部关于将政府收容教养的犯罪少年移至劳动教养场所收容教养的通知 (PRC Ministry of Justice notice on moving juveniles under government detention for reeducation to reeducation through labour camps for reeducation), 22 January 1996.

¹³⁹ 中华人民共和国行政处罚法 (Administrative Punishment Law, hereafter APL), 17 March 1996, art.8, para. 6.

¹⁴⁰ 国务院关于劳动教养问题的决定 (PRC State Council Decision on Reeducation through labour), 1 August 1957.

¹⁴¹ 全国人大常委会关于严禁卖淫嫖娼的决定 (NPC Standing Committee decision on the Strict Prohibition of Prostitution), 4 September 1991.

¹⁴² See e.g. 国务院卖淫嫖娼人员收容教育办法 (PRC State Council Measures on Detention for Education of Prostitutes), 4 September 1993, art.1.

Committee.¹⁴³ However, the law is yet to surface and the legality of these administrative measures remains disputed.

Indeed, the lawfulness of RETL has arisen in a case in 2007. “Chen Chao sues the RETL committee” became a landmark “case” in 2007¹⁴⁴ for claiming that the RETL system as a whole was unlawful and that the decision to intern the plaintiff for 2 years consequently lacked legal basis (*meiyou falü yiju* 没有法律依据). The court never heard the case as the RETL decision was cancelled and a formal arrest approval was given just as the case was to come up in the local court.¹⁴⁵ Available sources do not clarify the relationship between the two acts, however, one could suspect that there would be a rather close relationship between the suddenly aborted suit and the generally problematic legality of the RETL system. This case demonstrates some of the flexibility that is allowed within the Chinese legal system as to the legality of coercive measures involving deprivation of liberty. Similarly there are questions that may be put forth with regard to other administrative measures that are either subject to weak normative control or even completely lack governing laws, more on this below.

Another aspect of the flexibility of administrative measures that was touched upon in the “Chen Chao 陈超” case was the use of RETL as a substitute for formal arrest. The local Procuratorate did not approve the arrest application from the police due to lack of evidence and ordered that the suspect be released from custody immediately. However, rather than following this order, the police held Chen Chao for another 5 days until a decision was obtained sentencing him to Reeducation through labour for 2 years. This instrumental use of RETL illustrates how the criminal justice system may be used along with administrative penal measures to increase the authority of the police. At the same time this leaves some chilling conclusions as to the continued instrumental nature of coercive measures and legality in relation to the administration of justice and the limits on the right to liberty of person.

5 Detention and restriction of personal liberty

The third paragraph of Article 37 elaborates on the scope of the provision in relation to the nature of the deprivation of liberty concerned. In addition to arrest, the provision includes unlawful detention/custody (*jujin* 拘禁), “deprivation or restriction of citizens’ freedom by other means”, and unlawful search (*soucha* 搜查). *Jujin* is probably better translated as “custody”, however, following the usual translation of Article 37 the term “detention” will be used. A distinction will be made in the text as to the Chinese term in question.

¹⁴³ 廖卫华 (Liao W) 违法行为矫治拟替代劳教制度 (Correction Illegal Acts Drafted as Alternative to RETL System), 新京报 (Xin Jing Bao), 2 March 2005, A07, <http://www.chinalawinfo.com/fzdt/NewsContent.aspx?id=13663>. Accessed 12 April 2011.

¹⁴⁴ 2007 年度十大影响性诉讼 (The Ten Biggest Law Suits in 2007) 南方周末 (Southern Weekend), 10 January 2008, <http://www.infzm.com/content/6007>. Accessed 12 April 2011.

¹⁴⁵ 吴勇 (Wu Y) (Ed) 劳动教养制度的存废之争 (Existence and Abolition of the RETL System) Dahe.cn, 6 December 2007, http://www.dahe.cn/XWZX/rdtj/t20071206_1219106.htm. Accessed 18 June 2008; Sommeregger 2006 and Golub and Lingley 2008.

“Detention” (*jujin* 拘禁) refers to deprivation of personal freedom by means of detention (*juliu* 拘留) as discussed above, confinement (*jinbi* 禁闭) or other coercive measures, which have been suggested to include, *inter alia*, trussing up (*kunbang* 捆绑) and investigation in isolation (*geli shencha* 隔离审查).¹⁴⁶ This shallow definition, however, must be seen as only a hint of all the possible ways deprivation of liberty may occur. Other means for deprivation or restriction of freedom includes any other act of restriction of liberty of person, for example unlawful restraints, trafficking and forced prostitution.¹⁴⁷ Extra-legal state practices such as local governments establishing so-called “small black rooms” (*xiao hei wu* 小黑屋), study classes (*xuexiban* 学习班), “gray jails” (*huilao* 灰牢), or the far more profiled “black jails” (*hei jianyu* 黑监狱),¹⁴⁸ places further challenges to the actual enjoyment of the stipulated rights under Article 37. These measures, as punitive, retributive or reformative sanctions in order to handle perceived transgressions of policies or administrative rules such as violations of family planning rules,¹⁴⁹ or as an unlawful government response to petitioning (*xinfang* 信访) etc., constitute *de facto* deprivation of liberty by being locked up in a room for “studies” from a few days to a couple of weeks.¹⁵⁰ All of these measures completely lack legal foundation. Despite a verdict—already in 1992—clearly deeming such measures as “illegal administrative acts” (*weifa xingzheng xingwei* 违法行政行为),¹⁵¹ local governments continue to employ extra-legal disciplinary measures, further weakening the value of the existing legal guarantees against arbitrary deprivation of liberty.

The Party-level parallel to the *huilao* is the highly opaque *shuanggui* system that allows for the use of detention by the CCP Commissions for Discipline Inspection to investigate Party members for violations of discipline violations, including corruption. Although far more regulated than the *ad hoc* measures employed by local governments, *shuanggui* is still problematic in constitutional terms, especially as the internal Party rules on the system clearly are challenged by the legality requirement discussed above.¹⁵²

On the horizontal level CL Article 238 (previously CL Article 143 prior to the 1997 revision) is the chief and defining stipulation on protection of the right to personal freedom. This article reflects the “horizontal” norm aspects of Article 37,

¹⁴⁶ Quanguo renda changweihui bangongting yanjiushi zhengzhi zu 1996, p. 162.

¹⁴⁷ Ibid.

¹⁴⁸ Human Rights Watch 2009; “学习班”为何叫“小黑屋” (Why “Studygroups” are Called “Small Dark Rooms”) 广西新闻网-南国早报 (Guangxi Xinwen Wang—Nanguo Zaobao), 2 April 2007; 拆迁学习班是代表性的违法事件 (Classes on Forced Demolition Classic Case of Illegal Activity) 北京青年报 (Beijing Youth Daily), 4 April 2007 <http://www.ynet.com/view.jsp?oid=19829584> Accessed 28 May 2007.

¹⁴⁹ See commentary cited above in *Li Jinsheng v. Yanshi city PSB*, 26 May 1997, Yanshi City People’s Court, Henan Province.

¹⁵⁰ For an account of the development and use of these “gray jails”, see Wu 2007, p. 57.

¹⁵¹ 闵绍清等四人诉四川省大邑县元兴乡人民政府强行扣押其财产和限制人身自由行政侵权案 (Min Shaoqing et al. v. Sichuan Dayi county People’s Government), 20 March 1992, 四川省大邑县人民法院 (Dayi County People’s Court, Sichuan Province).

¹⁵² For a systematic look into the *shuanggui* system see Sapio 2008b.

para. 3, as it prohibits any person to “unlawfully detain another person or unlawfully [deprive] the personal freedom of another person by any other means”.¹⁵³ There have been a number of cases that handle deprivation of liberty and violations under this rule that also paint a broader picture of what “unlawful detention” may entail: forcing a person to remain in a room¹⁵⁴; detaining a person in a building or a room such as a corridor,¹⁵⁵ meeting room,¹⁵⁶ or toilet¹⁵⁷; locking or sealing in a person in a room¹⁵⁸; only using threat of violence to hold a hostage (does not involve confining a person to a specific room)¹⁵⁹; as well as holding a person as hostage as leverage for enforcement of debt (as stipulated Article 283(3)).¹⁶⁰ These cases illustrate that the application of Article 238 not only concern direct restriction of liberty in an ordinary sense, i.e. locking someone up, but also not allowing someone to leave a locality or using threats to restrict the liberty of person are also within the scope of the law, underscoring the suggested definitions above.

Other acts of unlawful restriction of personal freedom, are elsewhere covered by the criminal law, for example trafficking in women and children,¹⁶¹ buying trafficked women and children and unlawful deprivation and restriction of their personal freedom,¹⁶² forcing another to work by restricting his or her personal freedom,¹⁶³ maltreatment of family members,¹⁶⁴ kidnapping for the purpose of extortion.¹⁶⁵ As for a differentiation between the latter provision and the above

¹⁵³ CL 1997, art.238, para.1.

¹⁵⁴ 冯玉霞非法拘禁他人强迫他人作伪证包庇罪犯案 (Feng Yuxia case), 8 August 1994 河南省邓州市人民法院 (Dengzhou County People’s Court, Henan Province).

¹⁵⁵ 禹作敏等八人非法管制、非法拘禁、窝藏、妨害公务、行贿案 (Branch of the People’s Procuratorate of Tianjin Municipality v. Yu Zuomin, et al.), 27 August 1993, 天津市中级人民法院 (Tianjin Intermediate People’s Court).

¹⁵⁶ 陆国平、王国富故意伤害案;汪金成非法拘禁案 (Lu Guoping et al. case), 16 August 2000, 上海市虹口区人民法院 (Hongkou District People’s Court, Shanghai).

¹⁵⁷ 张韬故意杀人、非法拘禁, 奚大震非法拘禁、包庇, 胡宇非法拘禁, 姜广毅包庇上诉案 (Zhang Tao et al. appeals case), 14 December 2000, 北京市高级人民法院 (Beijing High People’s Court).

¹⁵⁸ 马长岭、李京波在索债过程中非法拘禁他人案 (Ma Changlin et al. case), 27 September 1994, 山西省阳泉市中级人民法院 (Yangquan City Intermediate People’s Court, Shanxi Province).

¹⁵⁹ 陈学全非法拘禁案 (Chen Xuequan case), 28 November 1996, 福建省长泰县人民法院 (Changtai County People’s Court of Fujian Province); See also the 2000 SPC interpretation on the application of this provision under art.238(3) in 最高人民法院关于对为索取法律不予保护的债务, 非法拘禁他人行为如何定罪问题的解释 (Supreme People’s Court interpretation of the question of how to sentence acts of unlawful detention in order to recover debts not protected by the law), 13 July 2000, in 1985–2005 年司法解释 (Interpretations of Civil Law from 1985 to 2005) 2005, p. 157.

¹⁶⁰ 白国栓、于彦蛟劫持人质索要欠款致人死亡案 (Bai Guoshan et al. case), 23 July 1995, 湖北省孝感市中级人民法院 Xiaogan City Intermediate People’s Court, Hubei Province); 胡爱斌挟持他人作人质非法拘禁案 (Hu Aibin et al. case), 17 March 1998, 湖南省邵阳市北塔区人民法院 (Beita District People’s Court, Shaoyang City, Hunan Province); 吴少军、赵青非法拘禁上诉案 (Wu Shaojun et al. appeals case), 21 November 2000, 内蒙古自治区高级人民法院 (High People’s Court of the Autonomous Region of Inner Mongolia).

¹⁶¹ CL 1997, art.240.

¹⁶² Ibid., art.241, para. 1.

¹⁶³ Ibid., art.244.

¹⁶⁴ Ibid., art.260.

¹⁶⁵ Ibid., art.239.

hostage situation, Zhendong Municipal People's Court, Haikou, made the following statement in the verdict of the "Huang Yongzhu case" (黄永柱案):

Ordinary citizens may constitute the subjects of the crime in both [types of] crimes. The object of violation in both cases includes the right to liberty of person. The objective aspects (*keguan fangmian* 客观方面) of the crimes are manifested by using coercive means in order to depriving another person of the right to personal freedom (*renshen ziyou quan* 人身自由权), and the subjective aspect of the crimes is that their purpose is to obtain material assets (*caiwu* 财物).

In making a statement on the motivations for unlawful deprivation of liberty as basis for difference in nature of criminal acts the verdict continues:

The difference between the two crimes is: The objective in the crime of kidnapping is to obtain other people's material assets (*caiwu* 财物), often the possessions of the injured party or his/her family members. Before committing the crime the criminal generally does not have a material assets (*caiwu* 财物) exchange relations with the injured party or members of his/her family. The debt sought repaid in crimes of unlawful detention (*feifa jujin zui suoqu de zhaiwu* 非法拘禁罪所取得债务), on the other hand, is a debt owed by the injured party and his or her family members to the perpetrator; before the crime is committed, a creditor-debtor relationship (*zhaiquan zhaiwu guanxi* 债权债务关系) exists between the criminal and the injured party or his/her family.¹⁶⁶

However, the prohibition against deprivation of liberty between citizens is not absolute, exceptions include acts of restrictions on personal freedom of minors made by parents, guardians or supervisors in order to educate or discipline them. Prevention or intervention against children at risk of being lured into criminal acts by, for example forbidding him or her to leave house or room (bedroom or other room), is also considered legitimate.¹⁶⁷ Of course, disciplining minors does have to be proportionate, and crossing a certain degree of restriction to personal freedom, may constitute a violation, and in serious cases amount to crime of abuse, and should bear criminal responsibility.¹⁶⁸

Finally, the question of the term "search" as found in Article 37 and its further normative scope as found in CL Article 245 (Article 144 in the 1979 Criminal Law). The scope of "search" is said to include the body, clothes on the body and objects that are carried at the time of the search.¹⁶⁹ However, the literature on the issue is

¹⁶⁶ 黄永柱非法拘禁案 (The Case of Huang Yongzhu's Unlawful Detainment), 18 September 2000, 海口市振东区人民法院 (Zhendong District People's Court, Haikou City).

¹⁶⁷ Li and Zu 2002, p. 433 and Chen and Wu 2003.

¹⁶⁸ Chen and Wu 2003.

¹⁶⁹ See commentary in 倪培璐、王颖诉中国国际贸易中心侵害名誉权纠纷案 (Ni Peilu and Wang Ying v. China World Trade Center), 18 November 1992, 北京市朝阳区人民法院 (Chaoyang District People's Court, Beijing). The case concerns the unlawful search of two customers at a supermarket within the World Trade Center in Beijing, although the court never got to render a verdict in this case (it was settled out of court) and the original charges only refers to the right to honor (*mingyu* 名誉), making no

not abundant and the limitations concerning this provision are not clear. The police are authorized to perform searches.¹⁷⁰ What is unclear is whether *other* law enforcement agencies, especially the city administration organ (*chengshi guanli xingzheng zhifa* 城市管理行政执法 or “*chengguan* 城管”), may perform searches of personal property. Furthermore, it is unclear as to whether a citizen’s car or his or her other movable things belong in the scope of “search of citizen’s body”; however, if a citizen’s vehicle is at the same time at his or her residence, the act of unlawful search would instead fall within the scope of Article 39 and the right to inviolability of the home.¹⁷¹ Although basic literature on criminal law does include residence (*zhuzhai* 住宅) within the scope of Article 245, it might be reasonable to make the distinction between the physical person and residence for the sake of a rights discussion.¹⁷²

6 Conclusion

Despite the cases that exist and the rather large amount of literature on constitutional theory in China, constitutional rights remain elusive and abstract. The lack of a binding interpretation of constitutional statutes grants the government fairly extensive elasticity in the understanding of rights. This again fits well with rights having to be adapted to the historical circumstances of the state, making constitutional statements programmatic in the sense that they are perhaps not intended to hold an acceptably broad scope or even to see immediate effect at all.

Furthermore, as has been discussed above, the question of access to redress is also dependent on the State recognition, further weakening any rights arguments. Thus, the lack of an interpretation, making any explicit and binding statements to the effect of the related provisions, leaves any claim regarding the validity of these provisions open to doubt, even on a theoretical level, and the only test for the content and scope of rights would then have to be found within the application of lower level legislation with the sometime help of references to constitutional provisions.

This conclusion points towards an inherent arbitrariness in both how constitutional rights are theoretically construed and how these rights are put into practice. The arbitrariness of this delineation of content and scope has been demonstrated through the above discussion on deprivation of liberty, however, it would be expected that a similar argument of arbitrariness could be made for the other forty-odd rights statements within the Chinese constitution.

Footnote 169 continued

reference to liberty of person, the case has received a lot of attention on the basis of the unlawful body search by a security guard. The commentary correctly makes the link to the illegal search made of the plaintiff’s handbags, see also Han 2005, p. 21 on the corresponding provision in the Consumer Protection Law (中华人民共和国消费者权益保护法 Law of the People’s Republic of China on Protection of Consumer Rights and Interests), 1 January 1994, art.25, prohibiting body searches as well as limitations on the consumers physical freedom (liberty of person).

¹⁷⁰ 中华人民共和国人民警察法 (PRC Police Law), 28 February 1995, art.12.

¹⁷¹ Xie 1999, p. 180.

¹⁷² See Gao and Ma 2005, p. 535 and Qu 2005, p. 277.

More specifically, the above discussion has covered some aspects of the right to liberty as provided for under Chinese law, where legal substance and procedure in general prescribe the following four guarantees:

1. Detention, arrest, administrative detention or other means of depriving individuals of their liberty requires a formal authorization or decision,¹⁷³ except in times of emergency¹⁷⁴;
2. The measures used for deprivation of liberty shall have a clear time limit, and where this time limit has been exceeded the detained or incarcerated shall have means of redress¹⁷⁵;
3. Compulsory measures should provide remedial mechanisms, providing detained and incarcerated with the ability to seek redress, and to guarantee the timely release of the detained¹⁷⁶;
4. Anyone found illegally detained shall have a general right to compensation.¹⁷⁷

This formalist description reveals the apparent lack of judicial control with deprivation of liberty. This lack of control with the state's authority and power to deprive its citizens of their liberty is a central weakness in the right as formulated in Article 37 of the constitution, and a demonstration of the general weakness of procedural rights within the Chinese legal system. This conclusion can also be extended to the other rights within the Chinese constitution. The lack of effective control with state powers combined with poor complaints mechanisms described above illustrates dramatically how constitutional rights in general are weak and subject to political constraints.

Furthermore, a more substantive analysis reveals that there is a lack of an efficient supervisory system for monitoring public security organs and People's Procuratorate, allowing abuse of power to happen without the possibility of independent review. Consequently we find that the existing procedural guarantees for ensuring lawful deprivation of liberty remains weak—and by some accounts fundamentally lacking.¹⁷⁸ Apart from the lawful actions of the police and the judiciary, other acts and measures violating the liberty of person pose further challenges for the protection of individual. These challenges not only include unlawful acts by other individual citizens, e.g. trafficking and sale of persons,

¹⁷³ See CPL 1996, arts. 59 and 71; SPP-CPL 1999, arts. 32, 77, 91; CivPL 1991, art.105; APL 1996, art.39; 中华人民共和国治安管理处罚法 (Law of the People's Republic of China on Public Security Administrative Punishments, hereafter SAPL), 28 August 2005, art.101; 国务院关于转发公安部制定的劳动教养试行办法的通知 (State Council Guidelines on the Implementation of Reeducation through labour, hereafter RETL Guidelines), 21 January 1982, art.12.

¹⁷⁴ See CPL 1996, art.61.

¹⁷⁵ See CPL 1996, arts. 58, 65, 69, 71, 72, 75, 124; SPP-CPL, 1999), art.34, para.2, 81, 83, 99; SAPL (2005), art.16, 2nd period (penalty), art.38 (summons and interrogation); MPS Rules (1998), arts. 62, 109, 127 (arts. 128 and 129 stipulate the extension of time limits stipulated by art.127).

¹⁷⁶ See CPL 1996, art.73; SPP-CPL 1999, arts. 83, 85, 96; MPS Rules 1998, arts. 135 and 150; SAPL 2005, art.39; RETL Guidelines 1982, art.12; 中华人民共和国行政复议法 (PRC Administrative Reconsideration Law, hereafter ARL), 29 April 1999, art.6, para. 2.

¹⁷⁷ SCL 1994, art.3, para.1, art.15, sections 1 and 2; 中华人民共和国民法通则 (PRC General Principles of Civil Law), 12 April 1986, arts. 119 and 121.

¹⁷⁸ Tong 2004, p. 31.

slavery, kidnapping, but also those of other state organs, for example through disciplinary measures initiated by city administration staff, local village governments or the Party, or through the use of RETL as a substitute for formal arrest and prosecution.

It is worthwhile to note that China's incarcerated population, is thought to be "roughly in line with international norms",¹⁷⁹ well behind the US and Russia. Whether or not this situation will remain is a big question. Approved criminal arrests lie above 900,000 prisoners year, and a conservative estimate of about 350,000 in different forms of administrative or reformatory deprivation of liberty, along with about 1.5 million prison inmates makes the number of incarcerated in China to about 2,750,000 persons, putting the Mainland's incarcerated population at about 210 prisoners 100,000 people, above an estimated East Asian average of 167, but well below the former Soviet Central Asian states at 292.¹⁸⁰

However, considering the weaknesses in the Chinese legal system with regard to procedural guarantees to prevent arbitrariness in deprivation of liberty as described above, in light of the sizeable estimates of people deprived of their liberty outside prison populations, we find that there is a huge potential for error. Furthermore, there is a very strong belief in the reformatory value of incarceration (at the same time that it fulfills the need to show strong punitive measures) and facing increasing crime, it is not very likely that the number of persons deprived of their liberty will be less as time passes by, making the establishment of functional control mechanisms even more important, in particular as administrative measures of incarceration remains an important tool for the public security agencies for fighting crime and maintaining public order.

These issues seen in relation to a formalistic legal framework and weak guarantees against arbitrariness, leaves the right to liberty of person under article 37 vulnerable to violations despite broad legislative basis, as would be the case with most other rights within the Chinese constitution.

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¹⁷⁹ Seymour 2007, p. 158.

¹⁸⁰ Figures and estimated from Ibid; and Walmsley 2006.

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